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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND BRIEF IN SUPPORT THEREOF.

THOMAS I. SHERIDAN,
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INDEX.

Subject Index.

	Page
Petition for a writ of certiorari	1
Summary statement of the matter involved	2
Reasons relied on for the allowance of the writ	9
Prayer for writ	13
Brief in support of petition for writ of certiorari	15
I. The opinions of the courts below	15
II. Jurisdiction	16
III. Statement of the case	19
IV. Specification of errors	20
V. Argument	21
Summary of argument	21
Point I—The Ohio courts refused, directly so, and contrary to constitutional provision to give full faith and credit to the New York judgment	22
Point II—Fraud in obtaining a judgment furnishes no ground for collateral attack	24
Point III—The judgment remains unimpeached and unimpeachable in New York and it is therefore not subject to collateral attack in Ohio	25
Point IV—Petitioner was the real party in interest in the New York suit	28
Point V—The New York judgment is conclusive upon whether petitioner is real party in interest	34
Point VI—The absence of extrinsic fraud	36
Conclusion	40

Table of Cases Cited.

Armstrong v. *Armstrong*, 117 O. S. 558	22
Allen v. *Brown*, 44 N. Y. 228	30, 32, 33
Abram French v. *Marx*, 8 N. Y. Misc. Rep. 490	35

Page

Bryant v. *Zimmerman*, 278 U. S. 63 23
Barbin v. *Moore*, 85 N. H. 362 29
Brown v. *Powers*, 53 N. Y. App. Div. 251 30
Birdall v. *Read*, 188 N. Y. App. Div. 46 30
Bachman v. *Hausman*, 241 N. Y. App. Div. 153 32
Banca C. I. Trust Co. v. *Clarkson*, 274 N. Y. 69 31
Brown v. *Ginn*, 66 O. S. 316 33
Borgos v. *Price*, 140 N. Y. Misc. Rep. 283 39
Boston & Maine R. Co. v. *D. & H. Co.*, 268 N. Y. 382 .. 26
Crapo v. *Kelly*, 83 U. S. 610 ..... 19, 22
Crescent City Livestock Co. v. *Butchers' Union*, 120 U. S. 141 ..... 19, 22
Christmas v. *Russell*, 72 U. S. 290 24
Cole v. *Cunningham*, 133 U. S. 107 24
Corley v. *N. Y. & H. Rail Co.*, 12 N. Y. App. Div. 409 .. 27
Casady v. *Scott*, 40 Idaho 137 32
Cauldwell v. *City of New York*, 252 N. Y. App. Div. 559, 278 N. Y. —, 15 N. E. (2d) 70 36
Donlin v. *Carlow*, 120 N. Y. Misc. Rep. 698 30
Dockery v. *Central*, 45 Arizona 434 39
Elmquist v. *Markoe*, 45 Minn. 305 30
Fiske v. *Kansas*, 274 U. S. 380 23
Fauntleroy v. *Lum*, 210 U. S. 230 24
Green v. *Van Buskirk*, 72 U. S. 307 ..... 19, 22
Great Western Telegraph Co. v. *Purdy*, 162 U. S. 329 . 19, 22
Gray v. *Richmond*, 167 N. Y. 348 27
Hancock National Bank v. *Farnum*, 176 U. S. 640 .... 19, 22
Hanley v. *Donoghue*, 116 U. S. 1 24
Holden, Matter of, 271 N. Y. 212 ..... 27, 39
Horne v. *McGinley*, 252 N. Y. App. Div. 296 30
Hunter v. *Allen*, 106 N. Y. App. Div. 557 30
Hentschel v. *Fidelity, etc.*, 87 F. (2d) 833 30
Hoffman v. *Foote*, 172 N. Y. 348 31
Harrington v. *Denny*, 3 Fed. Supp. 584, 68 F. (2d) 1004 ..... 36, 39
Jacobowitz v. *Herson*, 268 N. Y. 130 38
Kansas City So. Ry. v. *Albers Comm. Co.*, 223 U. S. 573 23
Kalb v. *Leff*, 138 N. Y. Misc. Rep. 830 32
Lentz v. *Oregon*, 116 Oreg. 683 30

	Page
Los Robles Water Co. v. *Stoneman*, 146 Cal. 203	30
McNitt v. *Turner*, 83 U. S. 352	24
McCauley v. *Georgia R. R. Bank*, 239 N. Y. 514	30
McCandless v. *Furland*, 293 U. S. 67	34
Mutual Life Ins. Co. v. *McGrew*, 188 U. S. 291	22
Milwaukee County v. *White Co.*, 296 U. S. 268	9, 24, 25, 27
Melgaard's Will, 200 Minn. 493	25
Mayor v. *Brady*, 115 N. Y. 599	27, 36
Meyers v. *Credit Lyonnais*, 259 N. Y. 399	30
Meeker v. *Claghorn*, 44 N. Y. 349	30, 33
Moffett v. *Robbins*, 81 F. (2d) 431	36
Phillips v. *Griffin*, 236 N. Y. App. Div. 209	26, 35
People v. *Ladew*, 237 N. Y. 413	32
Roche v. *McDonald*, 275 U. S. 449	25
Roby v. *Rainsberger*, 27 O. S. 674	35
Stricks v. *Siegel*, 135 N. Y. Misc. Rep. 608, 138 N. Y. Misc. Rep. 266	33
St. Louis, I. Mt. & So. Ry. Co. v. *Starbird*, 243 U. S. 592	23
Simmons v. *Saul*, 138 U. S. 439	24
Sheridan v. *The Mayor*, 68 N. Y. 30	30
Schwartz v. *Fletcher*, 238 N. Y. App. Div. 554	30
Spencer v. *Standard Corp.*, 237 N. Y. 479	30, 34
Seybold v. *Grand Forks*, 5 N. D. 460	30
Smead v. *Fay*, 1 Disney (Ohio), 531	35
Thompson v. *Whitman*, 85 U. S. 457	24
Tioga v. *Tidd*, 164 N. Y. Misc. Rep. 273	30
Toole v. *Fite*, 57 Utah 1, 168 Pac. 427	35, 39
Toledo Co. v. *Computing Co.*, 261 U. S. 399	36
United States v. *Throckmorton*, 98 U. S. 61	9, 24, 38
United States v. *Atkins*, 260 U. S. 220	24
United States v. *California & Oregon Land Co.*, 192 U. S. 355	35
Van Huffel v. *Harkelrode*, 284 U. S. 225	19
Ward v. *Southfield*, 102 N. Y. 287	27, 39
Warschauer v. *Webb*, 9 N. Y. St. Rep. 529	34
Webster v. *Reid*, 52 U. S. 437	24
Wolcott v. *Hillman*, 23 N. Y. Misc. Rep. 459	33
Wright v. *Saltmarsh*, 174 Oklahoma 226	38

Table of Statutes Cited.

	Page
Section 237 (b), Judicial Code	16
Section 344 (b), Title 28 of U. S. C. A.	16, 19
Section 350, Title 28 of U. S. C. A.	16
Section 905, Revised Statutes	16
Section 687, Title 28 of U. S. C. A.	16
Section 210, New York Civil Practice Act	4, 23, 31

Textbooks and Encyclopedias Cited.

Freeman on Judgments (5th Ed.), p. 633, 663	24
Freeman on Judgments (5th Ed.), p. 2569	39
Freeman on Judgments (5th Ed.) pp. 753-756	35
Williston on Contracts, Rev. Ed., p. 1296	29
Williston on Contracts, Rev. Ed., pp. 1166 to 1170	32
Williston on Contracts, Rev. Ed., p. 1294	32
Carmody's New York Practice, Vol. 2, pp. 804 to 808	29, 32
23 Cyclopedia 964	35
34 Corpus Juris, Section 859	35

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

To the Supreme Court of the United States and the Honorable Justices thereof:

The petition of Edward H. Titus, praying for a writ of certiorari on the ground that the courts of Ohio have denied full faith and credit to a final judgment rendered in the Supreme Court of the State of New York, and in support thereof, respectfully shows to this Honorable Court:

There is presently pending in this case a motion by petitioner to print an abbreviated record and by reason thereof references herein refer to the typewritten record and the exhibits annexed thereto.

A.

Summary Statement of the Matter Involved.

On May 1st, 1934, petitioner recovered a judgment in the Supreme Court of the State of New York against the respondent in the sum of $389,103.21 (R. 27-30). Thereafter petitioner instituted an action in the Common Pleas Court, Franklin County, Ohio (hereinafter referred to as the Common Pleas Court) for the purpose of making the judgment in the Supreme Court of the State of New York a judgment in the State of Ohio (R. 8).

Petitioner's action in the State of New York was instituted on December 22, 1925 (R. 147, folio 2) and was bitterly contested by respondent. Said action was tried twice in the Supreme Court of the State of New York (R. 144, page 41 of Case on Appeal; R. 146, page 52) and it was submitted upon five occasions to the Appellate Division of the Supreme Court of the State of New York, First Department (R. 144, page 53; 227 N. Y. App. Div. 789; R. 146, page 784; R. 147, page 42; R. 129), and once to the Court of Appeals before final judgment was obtained by petitioner (R. 133-135). In addition, three references were had (R. 144, folio 22; R. 145, pages 2-5; R. 30). The Ohio courts have predicated refusal to recognize the New York judgment on the ground of fraud (R. 176; 229, 233, 234) although the leading case of *United States* v. *Throckmorton*, decided by this Honorable Court in 1878, indicates that *extrinsic fraud*—possibly a method of attacking a judgment—*cannot be found where an adversary trial is had and the merits of a cause are disposed of.*

The action in the State of New York was instituted by petitioner, by reason of a fraud perpetrated by respondent, to impress a trust on 250 shares of the Secor Hotel Company, an Ohio corporation, representing a one-quarter in-

terest therein (R. 12, 15-18). Petitioner's complaint set forth the fraudulent conduct of respondent in connection with said stock and the resultant injury to petitioner (R. 14-17). In deciding that petitioner was entitled to the return of the stock the Appellate Division of the Supreme Court of the State of New York stated that petitioner's version was amply supported by the documentary evidence in the case (222 N. Y. App. Div. 17); and when said Appellate Division of the Supreme Court of the State of New York again recognized petitioner's ownership of said stock, after a new trial had been granted on the ground of newly discovered evidence, that court stated that the additional testimony was not of sufficient weight to cause the court to change the determination, in favor of petitioner, reached on the original appeal and for the second time rendered judgment for petitioner (235 N. Y. App. Div. 662). This judgment was affirmed by the Court of Appeals of the State of New York on July 19th, 1932 (260 N. Y. 519) and thereafter a reference was had which resulted in the award to petitioner in the sum of $389,103.21 (R. 27-30; 130, 131).

At the time of the institution of the action by petitioner, as plaintiff, in the Common Pleas Court, and at the present time, the judgment in the State of New York in favor of the petitioner and against respondent was and is a final judgment in said State of New York (R. 90, 103). The jurisdiction of the Supreme Court of the State of New York has been conceded by respondent and *no attempt has been made by him to impeach or set aside said judgment on any ground in the State of New York* (R. 95, 102, 167).

The petition filed by petitioner in the Common Pleas Court, on August 20th, 1934, alleged the recovery of the aforesaid judgment and attached to said petition was a transcript of the judgment recovered in the State of New York, authenticated as required by the Act of Congress (R. 10, 27-31).

Respondent's amended answer thereto averred three defenses: (1) that the judgment sued upon was not responsive to the issues made by the pleadings; (2) that petitioner was not the real party in interest; and (3) that the judgment in the State of New York was procured by fraud practiced upon the Supreme Court of that State and upon the respondent, in that petitioner was not the real party in interest and suppressed and withheld this fact from the Supreme Court of the State of New York (R. 69, 70). By further amendment respondent's answer set up Section 210 of the Civil Practice Act of the State of New York, requiring, with certain exceptions, that every action must be prosecuted in the name of the real party in interest (R. 73).

Petitioner and respondent waived a trial by jury in the Common Pleas Court (R. 89). The evidence in the case was largely documentary and petitioner relied wholly upon the judgment recovered by him in the Supreme Court of the State of New York, duly objecting and taking exception to the introduction of any evidence by respondent in derogation of said judgment (R. 99, 103-105, 106, 107). The trial court found against the respondent on the first defense (R. 166) but in favor of respondent on the second and third defenses, thereupon entering judgment for the respondent on December 3, 1936 (R. 167, 176, 193, 194). The judgment of the Common Pleas Court was affirmed by the Court of Appeals, Franklin County, Ohio (hereinafter referred to as the Court of Appeals) and judgment was entered, with respect thereto, on the 14th day of February, 1938 (R. 235). Petitioner then appealed to the Supreme Court of Ohio (R. 238, 241) under Article IV, Section 2 of the Constitution of Ohio, which gives that court jurisdiction as a matter of right in cases, among other things, involving questions arising under the Constitution of the United States; and petitioner further moved said Supreme Court of Ohio for an order directing the Court of Appeals to certify to the Su-

preme Court of Ohio its record for review (R. 245, 246). Said appeal as of right was based upon the decisions of this Honorable Court that where a claim is made upon or under a judgment of a sister state, it is a question arising under the Constitution of the United States. On April 27th, 1938, the Supreme Court of Ohio dismissed petitioner's appeal as of right and granted respondent's motion to dismiss the appeal as of right, so ordering and adjudging *on the ground that no debatable constitutional question was involved* (R. 240). The Supreme Court of Ohio likewise denied petitioner's motion for an order directing the Court of Appeals to certify to the Supreme Court of Ohio its record for review (R. 240). Five of the seven Judges sitting in the Supreme Court of Ohio rendered the aforementioned decision without opinion (reported in XI Ohio Bar 612).

A brief summary of the facts leading up to the rendition of the judgment in the Supreme Court of the State of New York and the subsequent judgment in the Common Pleas Court, gives full expression to petitioner's claim that the Court of Appeals failed to give full faith and credit to the judgment of the Supreme Court of the State of New York, to the end that the Court of Appeals and the Common Pleas Court denied to petitioner rights, privileges and immunities properly claimable under the Constitution and the Statutes of the United States.

Prior to 1924 petitioner had a substantial claim against respondent based upon respondent's fraud in connection with petitioner's 250 shares of stock of the Secor Hotel Company of Toledo, Ohio, which had been withheld from him by respondent for many years (R. 12-17). On or about March 31, 1924, petitioner assigned said claim to his brother, Walter Titus, under an oral understanding with regard to the use of any funds which might be derived therefrom in part to pay off and discharge certain indebtedness of petitioner and in part for the benefit of petitioner's wife (R.

165; 137-139). Said assignment was in writing and absolute upon its face.

On or about December 1, 1925, in order to define more effectively the rights of the various interested parties in said claim and in order that suit might be brought thereon, Walter Titus, by an instrument in writing (R. 137-139; 140-142; Petitioner's Exhibits D, E), reassigned said claim to petitioner. This instrument, after referring to the prior assignment and the oral understanding pursuant to which it was made, assigned said claim to petitioner by appropriate words and appointed petitioner as attorney-in-fact to effectuate collection of the claim. This instrument then provided that any money or other property collected upon said claim should be turned over to Walter Titus to be held and used by him, first, toward the payment of the expenses incurred in the collection of the claim, second, to the payment of one-half thereof to the wife of petitioner, third, to the payment or discharge of certain indebtedness of petitioner, and forth, the balance remaining, if any, to be paid to petitioner. Shortly after said reassignment, suit was instituted by petitioner on this claim in the Supreme Court of the State of New York, and said suit resulted in the judgment hereinbefore referred to (R. 147, folio 2).

After petitioner recovered judgment in the Supreme Court of the State of New York, one London I. Wallick, the brother of respondent, made claim against petitioner for a share in the proceeds, if any, to be realized from said judgment (Respondent's Exhibit 7; R. 151-163). Said London I. Wallick claimed that an agreement to that effect was made with petitioner on or about November 23, 1925 (R. 157; 144, Folios 104, 105). Petitioner and London I. Wallick were in sharp conflict over whether any such agreement had been made and as to the validity and effect of any writing as evidence of such agreement. Approximately

nine years after the institution of suit in the State of New York by petitioner against respondent, said London I. Wallick filed suit against petitioner in the Supreme Court of the State of New York, in which he asked for an injunction *pendente lite*, restraining petitioner from disposing of any of the moneys received or collected upon said judgment recovered by petitioner against respondent. Petitioner defended said suit and submitted therein an affidavit, dated August 17th, 1934, in opposition to the prayer for said injunction. Said affidavit set out at considerable length the history of the transactions between petitioner and respondent and London I. Wallick, relative to the subject matter of the action upon which judgment had been entered for petitioner and, among other things, petitioner's affidavit (R. 156, 157, 162, 163; Respondent's Exhibit 7) set forth the following: "I told him (London I. Wallick) at that time (November 23, 1925) that I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus. • • • The plaintiff's application for an injunction *pendente lite* should be denied. Prior to my execution of the instrument of November 23, 1925 (between plaintiff and London I. Wallick), I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus. The plaintiff herein knew of this assignment before the instrument of November 23, 1925, was executed. It is respectfully submitted that it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished." The words within parenthesis are petitioner's, submitted, presently, for explanatory purposes.

The Court of Appeals, adopting reasoning other than that adhered to by the Common Pleas Court (R. 223, 227), held that petitioner was not the real party in interest in the State of New York under the written reassignment of December 1, 1925, because that instrument constituted peti-

tioner an attorney-in-fact only (R. 225). Such holding is contrary to the decisions of the State of New York and to the general principles as enunciated by other courts as to what constitutes a person the real party in interest.

The Court of Appeals, having found by its interpretation of the reassignment of December 1, 1925, that the petitioner was not the real party in interest, then held that he had suppressed and concealed this fact from the New York court, as evidenced by the statements contained in the affidavit (R. 229, 233). While characterizing the statements as mere conclusions (R. 227, 228), referring to a status prior to the commencement of the New York action, that court nevertheless held that the petitioner in making such statements indicated that he knew at the time the action was filed in New York that he was not the real party in interest in the suit. In other words, the Court of Appeals, by virtue of statements made in a collateral proceeding some nine years later, held that the petitioner's state of mind at that time, as indicated by his statements, was such that by necessary implication his state of mind must have been the same nine years before when he filed the suit in New York, and therefore at that time knew that he had no right to file it.

In arriving at its conclusion to affirm the judgment in favor of the respondent granted by the Common Pleas Court, the Court of Appeals virtually disregarded the fact that in 1929 respondent moved in the Supreme Court of the State of New York for a new trial on the ground of newly discovered evidence and that respondent submitted therein an affidavit of one Gentsch, sworn to on March 9, 1929, in which certain matter is set forth with regard to an assignment by petitioner to Walter L. Titus and to petitioner's wife (R. 234; 144, pages 115-122). *Respondent possessed knowledge in March 1929 of a prior assignment made by petitioner, and respondent made inquiry with regard thereto on the second trial held in 1930* (R. 146, folios 489-491).

At that time petitioner testified, on cross-examination, with regard to the assignment. Petitioner testified that he did have an agreement with his brother, Walter Titus, and that it had always been a matter between them. Respondent's counsel proceeded to interrogate petitioner with regard thereto but did not press the point, in his cross-examination, to the extent of ascertaining the exact character of said assignment; and despite said evidence, putting the respondent on inquiry as to a prior assignment of petitioner's claim, respondent made no effort to amend his pleading for the purpose of setting forth a defense with respect thereto.

B.

Reasons Relied on for the Allowance of the Writ.

1. This Honorable Court expressed doubt in *Milwaukee County* v. *White Co.*, decided in 1935, as to whether fraud in the procurement of a judgment will serve as a bar to an action thereon. In any event it has never determined that a judgment may be collaterally attacked for the kind of fraud that was considered in this case. Such decisions as it has rendered, particularly *United States* v. *Throckmorton*, decided in 1878, indicate that a judgment is not impeachable for intrinsic fraud and that extrinsic fraud cannot be found where an adversary trial was had. A determination as to whether the defense of fraud in the procurement of a judgment is available collaterally to a judgment-debtor and further amplification of the meaning of extrinsic fraud are necessary to insure protection of the immunities, with respect to judgments, set forth in the Constitution and Statutes of the United States, since the courts of Ohio gave consideration to a defense purely technical in nature and ignored the adversary trial had in the State of New York.

2. The present status of the litigation between petitioner and respondent is such that an unimpeached judgment rendered in the State of New York because of a fraud perpetrated by respondent is, from the practical standpoint at least, uncollectible, while that same unimpeached New York judgment is disregarded in Ohio—the State in which respondent resides and in which his property interests are apparently centered—on the theory that the cause of action should have been prosecuted by petitioner's brother. If the present status is perpetuated by this Honorable Court's refusal to assume jurisdiction the aforementioned anomalous result would harden into grave injustice, because the statute of limitations would bar recovery in suit instituted by petitioner's brother. It would mean that while the courts of New York have decreed that respondent perpetrated a fraud *upon petitioner* and deprived him of $389,000—a fraud proved by documentary evidence—respondent may, nevertheless, continue "to enjoy his ill-gotten plunder".

3. If petitioner were not the real party in interest and if such fact had been concealed from the Supreme Court of the State of New York this would not render the judgment recovered by petitioner against respondent in the State of New York impeachable in that State and the same credit, validity and effect should have been given thereto in the courts of Ohio.

4. The judgment recovered in the Supreme Court of the State of New York by petitioner against respondent is conclusive upon whether petitioner was or is the real party in interest since that question was necessarily determined by the Supreme Court of the State of New York in rendering its judgment in favor of petitioner.

5. Under the instrument of reassignment from petitioner's brother, Walter Titus, to petitioner, dated Decem-

ber 1, 1925 (R. 137-139), petitioner was and is the real party in interest, possessing legal title to the cause of action against respondent at all relevant times and possessing, as well, a definite beneficial interest by reason of the fact that the proceeds of suit were to be applied in liquidation of petitioner's indebtedness, with part of the proceeds payable to petitioner directly. Petitioner possessed full power to discharge respondent on respondent's indebtedness as reflected in the cause of action. In so far as the instrument of reassignment appointed petitioner as attorney-in-fact for his brother, Walter Titus, said appointment was not in derogation of the legal title and entirely consistent therewith by reason of the fact that in non-statutory jurisdictions an assignee is compelled to maintain suit in the name of his assignor.

6. Whatever statements were contained in petitioner's affidavit of August 17, 1934 (R. 151-163), when considered and interpreted in the light of the entire affidavit and in the light of the circumstances under which it was given, do not warrant the interpretation that petitioner perpetrated a fraud upon the Supreme Court of the State of New York. Said affidavit was directed specifically to occurrences on and the status as of November 23, 1925 (R. 227, 228). London I. Wallick was not seeking to enjoin *petitioner's interest* in the judgment obtained against respondent, but was seeking to enjoin the disposition *of all* of the proceeds of the judgment (R. 152). In opposing the motion for the all-inclusive temporary injunction petitioner was entitled to every possible proper legal objection. London I. Wallick was not entitled to the temporary injunction because he knew of the prior assignment made by petitioner to his brother on March 31, 1924 (R. 144, pages 115-122; R. 156, 157) and said London I. Wallick was not entitled to more than the alleged contract itself contemplated, that

is, an interest subject to a known prior assignment. Specifically, whatever occurred after November 23, 1925, did not concern London I. Wallick and as far as the latter was concerned, petitioner was entitled to assert such facts as would reveal to the Supreme Court of the State of New York that London I. Wallick, based upon his alleged contract of November 23, 1925, was not entitled to the unusual remedy of an injunction. Said London I. Wallick could not enjoin what he knew and contemplated could not be enjoined as of November 23, 1925. His proper remedy, if any, was indicated to him in said affidavit interposed by petitioner, to wit, an action to set aside the assignment under the Debtor and Creditor Law of the State of New York. It remains, however, that in attempting to limit said London I. Wallick in his application for a temporary injunction no fraud was perpetrated upon the Supreme Court of the State of New York in the action commenced by petitioner against respondent, at which time petitioner was the possessor of the reassignment of December 1, 1925, which had been duly executed and delivered. The foregoing destroys any possibility of inferring extrinsic fraud.

7. The judgment of said Court of Appeals, Franklin County, Ohio, and the judgment of said Common Pleas Court, Franklin County, Ohio, and the findings and conclusions thereof, are, by reason of the foregoing, in violation of Article IV, Section 1 of the Constitution of the United States, each of said Courts having failed and refused to give to the judgment secured by the petitioner against respondent in the Supreme Court of the State of New York, the full faith and credit required to be given said judgment by said Article IV, Section 1 of the Constitution of the United States and the Statutes of Congress enacted pursuant thereto. Said findings, conclusions and judgments are contrary to the manifest weight of evidence; there is

no evidence in the record to support them and they are, further, contrary to law, and said courts thereby denied the title, right, privilege and immunities which your petitioner claims under the Constitution and the Statutes of Congress enacted pursuant thereto.

8. The Supreme Court of Ohio, in determining that it would not take jurisdiction of petitioner's appeal as a matter of right, on the ground that said appeal involved no debatable constitutional question, acted in derogation of petitioner's rights under Article IV, Section 2 of the Constitution of the State of Ohio, and further failed to protect and, in fact, denied the title, right, privilege and immunities which your petitioner claims under the Constitution of the United States and the Statutes of Congress enacted pursuant thereto and failed and refused to give full faith and credit to the judgment secured by the petitioner against respondent in the Supreme Court of the State of New York as required to be given said judgment by said Article IV, Section 1, of the Constitution of the United States and the Statutes of Congress enacted pursuant thereto.

Wherefore your petitioner respectfully prays that this petition for a writ of certiorari to the Supreme Court of Ohio to review the judgment of the Court of Appeals, Franklin County, Ohio, and the order or judgment of the Supreme Court of Ohio in this case be granted.

Edward H. Titus,
By Thomas I. Sheridan,
Aaron Frank,
His Attorneys.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 188

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The written opinion, dated November 30, 1937, of the Court of Appeals, Franklin County, Ohio, is not reported but it is set forth at length in the record on pages 220 to 234. The written opinion dated April 21, 1936, rendered in the Common Pleas Court, Franklin County, Ohio, is not reported, but it is set forth at length in the record on pages 166 to 176. No written opinion was rendered by the Supreme Court of Ohio (XI Ohio Bar 612).

The written opinion dated December 2, 1927, of the Appellate Division of the Supreme Court of the State of

New York, First Department, after the first trial, and by virtue of which it was held that petitioner was entitled to recover from respondent 250 shares of stock of the Secor Hotel Company, is reported in 222 N. Y. App. Div. 17; and the written opinion rendered by said Appellate Division of the Supreme Court of the State of New York after a second trial, granted upon newly discovered evidence, pursuant to which that court's original determination was adhered to, is reported in 235 N. Y. App. Div. 662. The affirmance thereof by the Court of Appeals of the State of New York was rendered without written opinion and a report thereof appears in 260 N. Y. 519.

No written opinion was rendered by the Appellate Division of the Supreme Court of the State of New York when said court affirmed an order granting a second trial on the ground of newly discovered evidence; nor did said Court render written opinions when it vacated the second referee's report and appointed Honorable Jeremiah T. Mahoney as Referee and when it affirmed the judgment in favor of petitioner and against respondent in the sum of $389,103.21. Said decisions are reported in 227 N. Y. App. Div. 789; 240 N. Y. App. Div. 818; and 244 N. Y. App. Div. 789, respectively.

II.

Jurisdiction.

1. Jurisdiction of this Court is invoked under the Judicial Code, Section 237 (b), as amended by the Act of February 13, 1925, U. S. C. A. Title 28, Section 344 (b); Section 350, Title 28 of U. S. C. A., as amended; and Revised Statutes, Section 905, Title 28 of U. S. C. A. Section 687.

2. The date of the judgment to be reviewed, as determined by the order of the Supreme Court of Ohio, dated April 27, 1938, adjudging its dismissal of petitioner's appeal

to said Court on the ground that no debatable constitutional question is involved, is April 27, 1938 (R. 240).

3. The petition filed by petitioner in the Common Pleas Court, Franklin County, Ohio, on August 20th, 1934, was predicated entirely upon the judgment, properly authenticated, recovered by petitioner against respondent in the Supreme Court of the State of New York (R. 8; 10; 27-31). Respondent's answer thereto set forth affirmative defenses presumably predicated upon exceptions to the rule that full faith and credit shall be given by each State to the judgments of a sister State (R. 69, 70, 73). The pleadings in the cause drew into question, directly so, the full faith and credit clause of the United States Constitution. In establishing a *prima facie* case at the trial held in the Common Pleas Court, Franklin County, Ohio, petitioner relied entirely upon the properly authenticated judgment recovered in the Supreme Court of the State of New York and during the course of the trial petitioner duly objected and excepted to the admissibility of any and all evidence offered by respondent in derogation of said judgment (R. 99; 103-107). Petitioner placed full reliance upon the judgment recovered by him in the New York Court. In refusing to enforce the judgment in Ohio the Common Pleas Court, of necessity, gave consideration to the constitutional question because it subjected the New York judgment to collateral attack, and it invoked in its conclusions an exception to the full faith and credit clause when extrinsic fraud is established. In addition, the constitutional question was squarely presented to the trial court because a motion was filed by petitioner to respondent's answer, seeking to strike it from the files as frivolous on the ground that under the full faith and credit clause of the Constitution the judgment became final in the State of New York and the defenses raised by the answer were, therefore, unavailing (R. 45-47; 101). This motion was overruled (R. 52).

The Court of Appeals considered and passed upon the constitutional question, as is apparent from the language of its opinion (R. 230-232), where the Court discussed the authorities determining under what circumstances a judgment of a sister State may be assailed despite the immunities set forth under Article 4, Section 1 of the United States Constitution. The contention that the New York judgment could not be denied the protection of the full faith and credit clause of the Constitution in the Courts of Ohio was again presented to the Supreme Court of Ohio by the Assignments of Error (R. 242). Moreover, arguments of counsel and all briefs submitted set forth full discussion of the immunity claimed by petitioner by reason of Article 4, Section 1 of the United States Constitution (R. 222, 230, 231). After affirmance of the judgment of the Common Pleas Court, Franklin County, Ohio, and within eighteen days thereof and on or about the 4th day of March, 1938, petitioner duly appealed to the Supreme Court of Ohio as a matter of right, by reason of a debatable constitutional question (R. 238, 241) and petitioner also moved said Supreme Court of Ohio for an order directing the Court of Appeals, Franklin County, Ohio, to certify to the Supreme Court of Ohio its record for review (R. 245, 246). Petitioner's appeal as of right to the Supreme Court of Ohio was dismissed on the ground that no debatable constitutional question was involved and petitioner's motion for an order directing the Court of Appeals, Franklin County, Ohio, to certify its record for review was overruled on the 27th day of April, 1938 (R. 240). The aforementioned decisions and rulings of the Supreme Court of Ohio, as found particularly in its entry dismissing the appeal (R. 240), thereupon became the final judgment of the highest State court in which a judgment could be had. The decision of the Supreme Court of Ohio whereby it refused to assume jurisdiction of the appeal on

the ground that no debatable constitutional question was involved, constituted a decision of the case on the merits.

By reason of the failure of the Courts of Ohio to give full recognition to the judgment recovered by petitioner against respondent in the Supreme Court of the State of New York, the title, right, privilege and immunity of petitioner, claimed under the Constitution and Statutes of the United States, which title, right, privilege and immunity were claimed by petitioner at all relevant times during the proceedings in Ohio and were dealt with by the courts of Ohio, were denied by the Common Pleas Court, Franklin County, Ohio, the Court of Appeals, Franklin County, Ohio and the Supreme Court of Ohio. It is respectfully submitted that this Honorable Court has jurisdiction to review the judgment rendered in this cause in Ohio under the provisions of Section 344 of Title 28, United States Code.

4. The following cases sustain the jurisdiction of this Court to review the judgment of the Court of Appeals, Franklin County, Ohio and the order or judgment of the Supreme Court of Ohio:

Van Huffel v. *Harkelrode*, 284 U. S. 225;
Green v. *Van Buskirk*, 72 U. S. 307;
Crapo v. *Kelly*, 83 U. S. 610;
Crescent City Livestock Co. v. *Butchers' Union*, 120 U. S. 141;
Great Western Telegraph Co. v. *Purdy*, 162 U. S. 329;
Hancock National Bank v. *Farnum*, 176 U. S. 640.

III.

Statement of the Case.

A full statement of the case has been given under the heading in "A" in the petition and in the interests of brevity no repetition of the statement will be made at this point, except to set forth that the instrument of assignment,

dated March 31, 1924, and the instrument of reassignment, dated December 1, 1925, by virtue of which it is established that petitioner was and is the real party in interest constitute respondent's Exhibit 8 (R. 165) and petitioner's Exhibits D, E, respectively (R. 137-142). It may also be pointed out that the affidavit executed by petitioner on August 17, 1934, upon which respondent relied in order to bring about the denial of full faith and credit to the judgment recovered by petitioner against respondent in the Supreme Court of the State of New York, constitutes Respondent's Exhibit 7 (R. 151-164).

The relevant portions of the affidavit of Gentsch, sworn to on March 9, 1929, which affidavit contains matter with respect to an assignment by petitioner to his brother and to petitioner's wife, is set forth in Respondent's Exhibit I, folios 345 to 359 thereof inclusive (R. 144). The Gentsch affidavit was submitted by respondent when he made a motion in the Supreme Court of the State of New York for a new trial on the ground of newly discovered evidence, and it is this affidavit which serves to spell out knowledge on the part of respondent of such facts which would have enabled respondent to plead lack of capacity in the action instituted by petitioner against respondent in the State of New York.

The testimony given by petitioner, in cross-examination, at the second trial held in the Supreme Court of the State of New York, as a result of which respondent again acquired sufficient knowledge with respect to an assignment, enabling respondent, if he saw fit, to plead lack of capacity, is set forth in respondent's Exhibit 3, at folios 489 to 491 thereof inclusive (R. 146).

IV.

Specification of Errors.

The reasons relied on for the allowance of the writ, appearing in the petition (ante pages 9-13), with the excep-

tion of the second paragraph thereof, contain the Specification of Errors now urged and are here adopted.

ARGUMENT.

Summary of the Argument.

Point I. The prosecution of petitioner's cause of action against respondent in the courts of Ohio necessarily involved a constitutional question since he sought to obtain recognition in Ohio of a judgment recovered in New York. The disposition of the constitutional question by the courts of Ohio was directly in derogation of petitioner's constitutional rights and therefore petitioner properly seeks to invoke this Court's supervisory jurisdiction.

Point II. The controlling authorities in this Court indicate that parties to an action cannot, in a collateral proceeding, impeach a judgment for fraud in the obtaining thereof.

Point III. Petitioner's judgment remains unimpeached and unimpeachable in the State of New York and, therefore, it was not properly subject to collateral attack in the Ohio courts.

Point IV. Petitioner was the real party in interest in the suit commenced by him in the Supreme Court of the State of New York by virtue of his legal ownership of the claim against the respondent, as well as his beneficial interest therein.

Point V. The judgment recovered by petitioner in the State of New York is conclusive upon whether petitioner is the real party in interest.

Point VI. Petitioner was guilty of no fraud on the New York court and even if he was, it did not constitute ex-

trinsic fraud and it did not justify a denial of full faith and credit to the New York judgment.

Point I.

The Ohio courts refused, directly so, and contrary to constitutional provision, to give full faith and credit to the New York judgment.

It is clear that the specific question in this case is whether the New York judgment is within the protection of the full faith and credit clause of the Constitution. The Ohio trial court and the Court of Appeals denied it this protection; and when the Supreme Court of Ohio failed to see that nonrecognition of the New York judgment involved a debatable constitutional question it likewise struck at the constitutional inviolability of the judgment.

The Supreme Court of Ohio achieved this result despite its own decision in *Armstrong* v. *Armstrong*, 117 O. S. 556, where suit was instituted in Ohio on a Kentucky judgment for alimony payable in future installments. The court held that the question arose "under the provisions of the Federal Constitution, Article IV, Section 1" and granted a petition in error as of right.

This Court, in determining its own jurisdiction, has held, uniformly and repeatedly, that where suit is filed in one State on a judgment secured in a sister State, or where a defense in one State is based upon a judgment secured in a sister State, the question presented is one arising under the Constitution of the United States.

Green v. *Van Buskirk*, 72 U. S. 307; 74 U. S. 139, 145;
Crapo v. *Kelly*, 83 U. S. 610, 620, 621;
Crescent City Livestock Co. v. *Butchers' Union*, 120 U. S. 141, 146, 147;
Hancock National Bank v. *Farnum*, 176 U. S. 640;
Great Western Telegraph Co. v. *Purdy*, 162 U. S. 329;
Mutual Life Ins. Co. v. *McGrew*, 188 U. S. 291, 311.

The decisions state only what is apparent, that is, that the ing of the petition itself presents the constitutional ques-on, as it is only by virtue of the full faith and credit clause f the Federal Constitution that a court of one State is re-uired to enforce a judgment rendered in a sister State. refusing to enforce the judgment in Ohio the lower courts ust necessarily have considered the effect of the judgment nder those provisions of the Constitution. No other situa-on is possible. *The mere presentation of the judgment for nforcement raises the question.*

In addition, the constitutional question was kept in the reground by reason of respondent's affirmative defenses f lack of capacity to sue an extrinsic fraud, the latter ing peculiarly applicable to suits on judgments and, fur-er, by reason of respondent's specific amendment to the nswer that Section 210 of the New York Civil Practice Act arred recovery in Ohio on the New York judgment.

It is well-recognized that no particular words or phrases re necessary for the assertion of the claim of consti-tional rights and that it is sufficient if it appears from e record, either expressly *or by clear intendment*, that ch rights were brought to the attention of the State court ith fair precision and in due time.

Bryant v. *Zimmerman*, 278 U. S. 63;
St. Louis, I. Mt. & So. Ry. Co. v. *Starbird*, 243 U. S. 592, 599.

It may be stated, parenthetically, that this Court may roperly review the findings upon which the Ohio courts de-rmined that petitioner was not the real party in interest nd that he perpetrated a fraud upon the New York court ecause the findings are completely interwoven with the enial of full faith and credit to petitioner's judgment re-vered in the State of New York.

Fiske v. *Kansas*, 274 U. S. 380, 385;
Kansas City So. Ry. v. *Albers Comm. Co.*, 223 U. S. 573, 591.

Point II.

Fraud in obtaining a judgment furnishes no ground for collateral attack.

In *Freeman on Judgments* (5th Ed.), pages 633 and 663, the view is expressed that *parties to an action*, as distinguished from third parties, may not attack a judgment collaterally for fraud, except possibly such fraud which goes to the question of jurisdiction.

This Court has stated, clearly and unequivocally, that fraud in procuring a judgment cannot be set up, by way of collateral attack, to bar recovery thereon. The principle may be expressed by the statement that a judgment may be assailed for want of jurisdiction, but not otherwise.

Christmas v. *Russell*, 72 U. S. 290, 303-306; cited in
Fauntleroy v. *Lum*, 210 U. S. 230, 236, 237;
Hanley v. *Donoghue*, 116 U. S. 1, 4;
Simmons v. *Saul*, 138 U. S. 439, 458;
Thompson v. *Whitman*, 85 U. S. 457.

In cases such as *United States* v. *Throckmorton*, 98 U. S. 61; *Cole* v. *Cunningham*, 133 U. S. 107, 112, and *United States* v. *Atkins*, 260 U. S. 220, when this Court discussed the question as to whether extrinsic fraud will bar enforcement of a judgment, *a direct proceeding*, attacking the judgment, was under consideration; while in such cases as *Webster* v. *Reid*, 52 U. S. 437, and *McNitt* v. *Turner*, 83 U. S. 352 (referred to in *Milwaukee County* v. *White Co.*, 296 U. S. 268, 276, on the subject of extrinsic fraud), suit was brought not to enforce a judgment, but to recover land purchased either under an execution sale or a court decree. In the two latter cases vacation of a judgment was not an objective in the action; the judgment was brought collaterally before the court as evidence and it was held there-

ore that, similarly, consideration might possibly be given, ollaterally, to the subject of extrinsic fraud. It is sub- itted that the *Webster* and *McNitt* cases have no rel- vancy in a case such as the instant one, which involves uit on the judgment itself.

The fundamental distinction between collateral and direct ttack, on the basis of fraud, led the Supreme Court of innesota in *In re Melgaard's Will*, 200 Minn. 493, to state, discussing the *Throckmorton* case, that:

> "Only after it has been determined, by other and appropriate standards, to be direct attack, on the ground of fraud, can the distinction between that which is extrinsic and that which is intrinsic find the subject-matter for its operation. In order to be open to collateral attack a judgment must be void on the face of the record, as for want of jurisdiction."

In the light of the foregoing, the statement in *Milwaukee ounty* v. *White Co.*, 296 U. S. 268, 276, that recovery on a dgment may be resisted "possibly because procured by raud" is entirely clear and completely reconcilable with e earlier authorities. It is expressive of the recognized istinction between *direct* attack, which may be countenanced nd *collateral* attack, such as the instant case, which will not e countenanced.

Point III.

The judgment remains unimpeached and unimpeachable New York and it is therefore not subject to collateral ttack in Ohio.

The law is well-settled that a judgment of a State court, hich had jurisdiction, is entitled in the courts of other tates to the same credit, validity and effect which it has in e State in which it was rendered.

Roche v. *McDonald*, 275 U. S. 449, 451, 452.

At the outset it may be stated that the defendant bore the burden of establishing, by a fair preponderance of the evidence, that the judgment obtained by petitioner was impeachable in the State of New York by reason of extrinsic fraud. In other words, it was incumbent upon respondent to show that the courts in the State of New York would set aside a judgment if suit therefor had been maintained by one who was not the real party in interest. No authority whatsoever was furnished on this point by the respondent or by either of the lower courts in Ohio. Assumptions by a foreign court as to what the New York court should regard as extrinsic fraud are completely unwarranted. An Ohio court cannot assert that a New York court *should* consider itself as having been subjected to extrinsic fraud. To disregard petitioner's judgment it was absolutely necessary for respondent to establish that a New York court *would* consider itself as having been subjected to extrinsic fraud—and only adjudication on this point can be regarded as conclusive. In summary, it is for the New York court—and only the New York court—to state whether its judicial process has been outraged. That statement must be found in the litigated case or in cases of similar nature. Respondent failed completely in his efforts to meet this test.

The New York viewpoint with regard to the effectiveness of a judgment is well stated in *Phillips* v. *Griffin*, 236 N. Y. App. Div. 209, at p. 211:

> "The question involves consideration of the full faith and credit clause of the Federal Constitution. (Art. 4, Sec. 1.) A judgment of a sister state may be assailed for want of jurisdiction over either the person or the subject-matter but not otherwise. (*Andrews* v. *Andrews*, 188 U. S. 14; *Clarke* v. *Clarke*, 178 id. 186)."

See also:

Boston & Maine R. Co. v. *D. & H. Co.*, 268 N. Y. 382, 391.

The recent case of *Matter of Holden*, 271 N. Y. 212 is absotely conclusive upon the point that petitioner's judgment ould not be impeached in New York.

As in the *Holden* case no one may question the validity of e reassignment to petitioner except the assignor and, posbly, petitioner's wife and London I. Wallick who comenced suit in the State of New York against the petitioner, questing therein a temporary injunction. As in the *olden* case the respondent is obligated to make payment to e party who appears to be the legal owner of the claim and court is empowered to inquire into collateral matters hich have no effect whatsoever upon respondent's obligaon to account with respect to petitioner's 250 shares of ecor Hotel stock.

Quite in accord with the principles enunciated by this ourt, the New York authorities do not adhere to the view at a judgment may be subjected to collateral attack on e ground of extrinsic fraud. Such New York cases as *ayor* v. *Brady*, 115 N. Y. 599; *Ward* v. *Southfield*, 102 N. Y. 7; *Corley* v. *N. Y. & H. Rail. Co.*, 12 N. Y. App. Div. 409; d *Matter of Holden, supra*, which gave consideration to e question as to whether extrinsic fraud would bar enrcement of the judgment, involved a direct attack, by way motion for new trial or suit in equity, as distinguished om a collateral attack; and it is apparent, therefore, that e New York authorities adhere to the implied distinction t forth in *Milwaukee County* v. *White Co.*, 296 U. S. 268, 6. The case of *Gray* v. *Richmond*, 167 N. Y. 348, is of no gnificance because the litigants therein proceeded upon the eory that an Indiana judgment could be attacked colterally and the New York Court of Appeals relied upon the ncession.

Reference has been made to the New York authorities der Point IV herein to the effect that the courts in the ate of New York will disregard all facts with respect the purpose of an assignment and the disposition of pro-

ceeds of suit if the assignment is fair upon its face. Reference has also been made under Points VI and V herein, respectively, to the view adhered to by the New York courts that an adversary trial will bar attack on a judgment and that technical defenses, such as lack of capacity, will be disregarded.

Point IV.

Petitioner was the real party in interest in the New York suit.

The trial court in Ohio and the Court of Appeals, prerequisite to their ultimate finding that the New York judgment was obtained by fraud, held that petitioner was not the real party in interest in the New York suit and had no right to bring the suit in his own name. The Court of Appeals did not, however, concur in the reasoning by which the trial court reached this result (R. 223, 227).

The trial court disregarded, erroneously so, the reassignment of the claim to petitioner on December 1, 1925 and held that petitioner was bound by isolated statements contained in his affidavit of August 17, 1934 (R. 172-176). The Court of Appeals took the proper view, that the affidavit referred to petitioner's status as of November 23, 1925, when legal title to the claim was in petitioner's brother and that whether petitioner was the real party in interest depended upon the legal effect of the reassignment of December 1, 1925 (R. 223, 227, 228). The Court of Appeals then proceeded to find as a matter of law—and in doing so it was completely in error—that the reassignment was a mere naked power of attorney (R. 225). It predicated its decision upon (1) the second paragraph of the reassignment which appointed the assignee (petitioner) as attorney-in-fact for the assignor (petitioner's brother) (R. 224-225) and (2) upon the fact that petitioner had only a contingent right to share in the proceeds of suit after certain payments (R. 225). The opinion concedes, however, that

"it is true the payments in these subheadings were to be made to liquidate the indebtedness" of petitioner (R. 225).

It is apparent, and the Court of Appeals so found, that if the instrument of December 1, 1925 (R. 137), constituted the petitioner the real party in interest in the New York suit, then the petitioner should have prevailed in the Ohio action. This fact would instantly remove any possibility of fraud upon the New York court as the only fraud alleged is the concealment from the New York court at the time the suit was instituted that the petitioner was not the real party in interest. *The Court of Appeals also conceded that the execution and delivery of the instrument of December 1, 1925, were undisputed* (R. 227).

The reassignment of December 1, 1925, sets forth an unqualified assignment (Petitioner's Exhibits D, E), appoints petitioner as attorney-in-fact for the assignor and provides for the distribution of the proceeds as follows: (1) payment of expenses; (2) one-half of the balance to petitioner's wife; (3) payment of petitioner's debts; and (4) payment of the balance to petitioner.

The effect and validity of the reassignment must be determined in accordance with the law of the place where the reassignment was made, that is, in accordance with the law of the State of New York.

Williston on Contracts, Revised Edition, page 1296;
Barbin v. *Moore*, 85 N. H., 362.

In *Carmody's New York Practice*, the standard work on procedure in that State, Vol. 2, pages 804 to 808, appears the following in reference to the "real party in interest" statute when the question of an assignment is involved:

> "The consideration paid, the purpose of the assignment, the use to be made of any proceeds collected, is immaterial. The plaintiff must have some title, legal or equitable, to the thing assigned. But if the assignee have such title, it is enough. So it is of no moment

that no consideration was paid for the demand by the assignee, or that others have a claim on the assignee for a portion or for all the proceeds, or that the assignment was made merely for the purpose of bringing an action. The defendant has no legal interest to inquire as to this, for a payment to or recovery by the assignee in such case is a protection to the defendant against any claim that can be made by the assignor. Thus where a judgment recovered by a bank, was, for the bank's convenience, assigned to the cashier by an instrument absolute upon its face, the cashier is the proper party to bring an action upon the judgment as ant in such case is that the legal title to the judgment is the real party in interest. All that affects the defend- in the plaintiff, so that a payment to, or satisfaction by him would be a full and complete satisfaction as to all others who theretofore had or might thereafter claim an interest in it." (pp. 806, 807.)

The cases supporting the same principles are:

Sheridan v. *The Mayor*, 68 N. Y. 30;
Schwartz v. *Fletcher*, 238 N. Y. App. Div. 554, 557;
Donlin v. *Carlow*, 120 N. Y. Misc. Rep. 698;
Horne v. *McGinley*, 252 N. Y. App. Div. 296;
Tioga v. *Tidd*, 164 N. Y. Misc. Rep. 273, 286;
Spencer v. *Standard Corp.*, 237 N. Y. 479;
McCauley v. *Georgia R. R. Bank*, 239 N. Y. 514;
Meyers v. *Credit Lyonnais*, 259 N. Y. 399;
Hunter v. *Allen*, 106 N. Y. App. Div. 557;
Allen v. *Brown*, 44 N. Y. 228;
Meeker v. *Claghorn*, 44 N. Y. 349;
Brown v. *Powers*, 53 N. Y. App. Div. 251;
Birdall v. *Read*, 188 N. Y. App. Div. 46;
Hentschel v. *Fidelity, etc.*, 87 F. (2d) 833, 838;
Lentz v. *Oregon*, 116 Oreg. 683;
Seybold v. *Grand Forks*, 5 N. D. 460;
Los Robles Water Co. v. *Stoneman*, 146 Cal. 203;
Elmquist v. *Markoe*, 45 Minn. 305.

The authorities enumerated state not only the New York but the general law as to who is a "real party in interest" under modern code provisions. With these authorities in mind it is difficult to follow the reasoning of the Court of Appeals that the reassignment of December 1, 1925, was simply a naked power of attorney and did not constitute the petitioner the real party in interest in the New York suit.

It may be noted, parenthetically, that Section 210 of the Civil Practice Act (New York), pleaded by respondent in his amended answer (R. 73) provides that: "Every action must be prosecuted in the name of the real party in interest, except that • • • a trustee of an express trust • • • may sue without joining with him the person for whose benefit the action is prosecuted." The very least that can be said of the reassignment is that petitioner was, by virtue thereof, the trustee of an express trust. *Hoffman* v. *Foote*, 172 N. Y. 348, 355, expresses the general principle that it is unnecessary to use any particular formula of words in order to create a trust and that principle was given full application in *Banca C. I. Trust Co.* v. *Clarkson*, 274 N. Y. 69, 74. In the latter case the loss suffered by plaintiff was made good by a surety company. It was agreed between plaintiff and the surety company that plaintiff would bring suit in its own name, but for the benefit of the surety company, to recoup the losses, the recovery, however, to be paid to the surety company. Based upon this simple arrangement, devoid of formality, the Court of Appeals held that plaintiff was a trustee of an express trust and that it was, therefore, entitled to bring suit in its own name. *Banca C. I. Trust Co.* v. *Clarkson*, *supra*, is, in and of itself, complete answer to the contention that petitioner was not the real party in interest.

It is well settled, moreover, that an assignor, assigning claim as security for a debt, still retains sufficient interest

in the claim to constitute the assignor the real party in interest. Petitioner had, therefore, a sufficient interest, under the March 31, 1924, assignment alone, to have brought suit in his own name.

Carmody's New York Practice, Vol. 2, p. 808;
Bachman v. *Hausman,* 241 N. Y. App. Div. 153.

In construing the reassignment, reference may be had to the recitals which show the true intent to make an assignment and not, merely, to appoint an attorney.

The words "sell, assign, transfer and set over" alone effectuate an assignment.

Kalb v. *Leff,* 138 N. Y. Misc. Rep. 830.

In stressing the second paragraph of the reassignment, where petitioner was appointed as the assignor's attorney, the Court of Appeals overlooked the fact that the paragraph is nothing more than a survival of the early law upon the subject of assignments and that it is just a precaution adopted for use in such jurisdictions as still adhere to the common law theory that an assignee must bring suit in the name of his assignor.

Williston on Contracts, Revised Edition, pages 1166-1170, 1294;
People v. *Ladew,* 237 N. Y. 413, at pages 436, 438;
Allen v. *Brown,* 44 N. Y. 228;
Casady v. *Scott,* 40 Idaho 137.

The reassignment provides that petitioner, if he collects anything, shall turn the proceeds back to petitioner's brother, but petitioner's brother must use the proceeds in discharging certain indebtedness of the petitioner to petitioner's brother and others, paying one-half thereof to petitioner's wife and the balance to petitioner. These provisions were held wholly inconsistent with an assignment such

as would constitute petitioner the real party in interest for the reason that his interest by virtue thereof was only contingent (R. 225) and not real, that is to say, he was simply an attorney in fact. This holding is clearly wrong, because what is to be done with the proceeds is no concern of the debtor.

Allen v. *Brown*, 44 N. Y. 228;
Meeker v. *Claghorn*, 44 N. Y. 349;
Wolcott v. *Hillman*, 23 N. Y. Misc. Rep. 459.

In reaching the conclusion that the petitioner was not the real party in interest under the reassignment, the Court of Appeals disregarded entirely the purpose in turning the proceeds of the collection, if any, over to petitioner's brother. The dominant purpose was to pay petitioner's debts to petitioner's brother and others, and to pay petitioner's wife; the balance, if any, to be paid to the petitioner. Petitioner's brother had no interest in the claim other than as security for the payment of the petitioner's debt to him—the balance belonged to the petitioner and his wife. As part of petitioner's brother's security, he was to handle the funds if the petitioner collected any, a provision clearly incidental to the primary purpose of the instrument. Had petitioner no interest other than payment of his obligations to his brother, they were, after all, his own obligations, which fact alone would give him a real substantial, beneficial interest. On this point *Brown* v. *Gimn*, 66 O. S. 16, referred to by the Court of Appeals, is inapplicable; and, moreover, that case involved a champertous transaction.

Stricks v. *Siegel*, 135 N. Y. Misc. Rep. 608, affirmed as modified 138 N. Y. Misc. Rep. 266.

The Court of Appeals hopelessly confused the question of title to the claim with the question of the disposition of

the proceeds. The distinction was clearly pointed out in *Warshauer* v. *Webb*, 9 N. Y. St. Rep. 529, in that the right of one entitled to a part or all of the proceeds can only attach after the claim has been collected and not before. The very fact that the reassignment requires the petitioner to "endorse, transfer and deliver" the proceeds to petitioner's brother connotes title thereto in the petitioner. As between the assignee and the debtor, the only concern of the debtor is whether payment to the assignee is a complete satisfaction and extinguishment of the claim.

The Court of Appeals relied upon *Spencer* v. *Standard Chemicals Co.*, 237 N. Y. 479, 143 N. E. 651 as supporting its conclusion and quoted from the headnote found in the Northeastern Reporter (R. 226), which is inaccurate because, while the opinion itself says that a plaintiff must have "some title, legal or equitable, to the thing assigned", the headnote omits the significant word "some".

In summary, until the respondent is discharged—and he cannot have any concern in what occurs thereafter—petitioner has legal title under paragraph 1 of the reassignment. By reason of the common law he is given protective powers under paragraph 2—powers not in derogation of the legal title and quite consistent with the assignment itself. And under paragraph 3 he has legal title to both the claim and the proceeds at all relevant times (in so far as respondent is concerned).

Point V.

The New York judgment is conclusive upon whether petitioner is real party in interest.

Whether petitioner was the real party in interest is now immaterial as the judgment of the New York court is conclusive upon that issue and the question could not be raised in the Ohio action. Lack of capacity to sue is not an objection that goes to the jurisdiction of the court.

McCandless v. *Furland*, 293 U. S. 67, 75.

By paragraph II of his second amended complaint in the New York action (R. 12), petitioner asserted he was the plaintiff in the action and "now is and since in or about the month of October, 1906, has been the owner of a one-quarter interest" in the Secor Hotel Company, represented by 250 shares of the common stock of that company. The ownership of the stock and the alleged interest of petitioner in the company were the basis of petitioner's claim. Said complaint then proceeds to set forth the fraudulent conduct of respondent in connection with the stock and the resultant injury to petitioner. By his second amended answer (R. 20) respondent specifically denied the allegations of Paragraph II of said amended complaint, thus putting squarely in issue the petitioner's ownership of the stock and the claim sued upon. The New York judgment is conclusive, not only as to matters thereby actually determined, but also as to every other matter which might have been litigated and decided upon the issues made in the case, and upon which it was tried. This doctrine is peculiarly applicable to defenses not going to the merits of the controversy, such as real party in interest, capacity to sue, etc., and a judgment cannot be impeached collaterally by the assertion of such defenses after judgment.

23 Cyc. 964;
34 *C. J.* Sec. 859;
Freeman on Judgments, 5th Ed., pages 753-756;
Roby v. *Rainsberger*, 27 O. S., 674;
Smead v. *Fay*, 1 *Disney* (Ohio) 531;
Abraham French v. *Marx*, 8 N. Y. Misc. Rep. 490;
Phillips v. *Griffin*, 236 N. Y. App. Div. 209;
U. S. v. *California & Oregon Land Co.*, 192 U. S. 355.

It matters not that the plaintiff may have falsely represented or withheld from the defendant his lack of capacity to sue or the fact that he was not the real party in interest.

Toole v. *Fite*, 57 Utah 1, 168 Pac. 427.

Whether the respondent knew of the defenses which he failed to assert in the original action is immaterial.

Couldwell v. *City of New York*, 252 N. Y. App. Div. 559, 562; affirmed 278 N. Y. —, 15 N. E. (2nd) 70.

Still another principle foreshadows the respondent's right to set up in the Ohio suit the defense of the real party in interest, and that is the principle that a party cannot set up after judgment facts constituting a defense of which he was ignorant but which, had he been diligent, he could have discovered.

Toledo Co. v. *Computing Co.*, 261 U. S. 399, 421;
Mayor, etc. v. *Brady*, 115 N. Y. 599;
Harrington v. *Denny*, 3 Fed. Supp. 584, 593, appeal dismissed 68 Fed. (2) 1004;
Moffett v. *Robbins*, 81 F. (2d) 431.

Surprising as it may seem, there is no discussion by the Court of Appeals of this elementary principle of *res judicata* and its application to the instant case (R. 234).

Point VI.

The absence of extrinsic fraud.

The Court of Appeals, having determined that the petitioner was not the real party in interest under the reassignment of December 1, 1925, then proceeded to determine whether he suppressed and concealed that fact from the New York court and if he did, whether he committed such a fraud on the New York court as would deny to the New York judgment full faith and credit in Ohio. The court found the solution of the question "difficult" (R. 229).

In reaching its conclusion that petitioner has concealed and suppressed from the New York court the fact that he was not the real party in interest, the court had recourse to the affidavit filed by the petitioner in the London Wallick

ction some nine years after the beginning of the original ction. The circumstances surrounding the affidavit are lly set forth in the petition (*ante*, pages 6, 7, 11 and 12). Although the Court of Appeals had previously in its opinon characterized parts of the affidavit as simply conclusions nd of no effect whatever in determining petitioner's actual tatus before the New York court in the original action (R. 23, 227, 228), nevertheless, it held that these "conclusions" ade nine years later were evidence establishing that when he petitioner filed his original action he knew that he was ot the real party in interest under the reassignment of December 1, 1925. This line of reasoning cannot be followed. The fact remains, and it is undisputed, that when petiioner originally filed his suit in New York he had the reassignment of December 1, 1925, duly executed and delivered, in his possession (R. 119, 143, 227). Even if that nstrument did not constitute the petitioner the real party n interest as a matter of law, it was such an instrument as ould justify any layman in thinking that it did give him uthority to institute the suit; and, therefore, failure to isclose any supposed information in the instrument would learly not be fraudulent. To hold that because of statements mad[illegible] petitioner nine years later, in a collateral roceeding, he therefore had interpreted an instrument to is disadvantage nine years before and concealed this inerpretation from the court, is extending the probative value f such evidence beyond sound legal principles. The statements contained in the affidavit, when considered and interpreted in the light of the entire affidavit and in the light f the circumstances under which it was given, do not warant any such extension of its probative value (*ante*, pages 7, 11 and 12).

There is a legal principle of universal recognition and acceptance that the fraud which may possibly render a judgent vulnerable to impeachment is "extrinsic" fraud as

distinguished from "intrinsic" fraud, or, in other words, fraud collateral to the matter tried as distinguished from fraud connected with the merits of the controversy. In discussing what constitutes "extrinsic" fraud, this Court, in the leading case of *U. S.* v. *Throckmorton*, 98 U. S. 61, said at pages 65 and 66:

> "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing. See Wells, Res Adjudicata, Section 499; *Pearce* v. *Olney*, 20 Conn., 544; *Wierich* v. *DeZoya*, 7 Ill. 385; *Kent* v. *Ricards*, 3 Md. Ch. 392; *Smith* v. *Lowry*, 1 Johns. (N. Y.), Ch. 320; *DeLouis, et al.* v. *Meek, et al.*, 2 Iowa 55."

See also:

Wright v. *Saltmarsh*, 174 Oklahoma 226;
Jacobowitz v. *Herson*, 268 N. Y. 130, 133, 134.

The distinguishing character of "extrinsic" fraud is that it is that kind of fraud which prevents an adversary trial upon the issues. If a party has lost his case by false swearing, perjury, concealment, etc., all of which go to the merits of the controversy and the issue before the court and none of which prevents him from having an adversary trial on

the merits, then he has his remedy by way of new trial, appeal, error, vacation, etc., but once the judgment has become final it is conclusive upon him and cannot be collaterally attacked. The principle, although it may operate harshly in some instances, is a rule of necessity—the public necessity that there be some time an end to litigation. As has been shown, heretofore, non-disclosure of lack of capacity to sue or that the petitioner is not a real party in interest does not constitute fraud under any definition for the obvious reason that a party is not required to disclose to his adversary facts which would defeat his recovery. If such nondisclosure be accompanied by concealment or false swearing or perjury, it can rise only to the dignity of "intrinsic" fraud and furnishes no basis for a collateral attack upon the judgment.

Toole v. *Fite*, 57 Utah 1;
Borgos v. *Price*, 140 N. Y. Misc. Rep. 287;
Harrington v. *Denny*, 3 Fed. Supp. 584, 593, 594 (appeal dismissed 68 F. (2d) 1004);
Matter of Holden, 271 N. Y. 212.

It should be noted, moreover, that the term "extrinsic fraud" means actual fraud. It signifies a case where one knowingly and deliberately seeks to take undue advantage of another for the purpose of defrauding him; and this is true as well, in a case where the fraud consists of a concealment.

Freeman on Judgments, 5th Ed. page 2569;
Dockery v. *Central*, 45 Arizona 434;
Ward v. *Southfield*, 102 N. Y. 287.

In this case there is absolutely no connection whatsoever between petitioner's arrangement to distribute the proceeds of suit and the respondent's obligation to return petitioner's 250 shares of stock and his obligation to account with respect to the moneys received by him during his possession

thereof. What undue advantage was taken when petitioner obligated himself to make distribution of the proceeds of his claim to his wife and to creditors, retaining the right to any balance remaining thereafter? What fraud was perpetrated by this arrangement upon respondent—one who has no interest whatsoever in what petitioner seeks to accomplish with the proceeds of his claim? If petitioner had assigned his claim to petitioner's brother and if petitioner's brother had reassigned it by simple instrument prior to petitioner's suit against respondent, then, certainly, it could not be contended that petitioner was under duty to reveal what had occurred to the New York court. This hypothetical illustration is, in effect, the instant case. The only difference is that the reassignment under review provides for certain beneficial interests—a matter that does not concern the respondent. The hypothetical illustration and the instant case are the same in that in both there is the complete assignment of legal title.

Petitioner proceeded under an instrument of reassignment which indicated to him that he had a perfect right to sue in his own name and it is inconceivable that any court would contend, that petitioner, a layman, armed with that instrument, intended to perpetrate a fraud upon the New York court.

Conclusion.

For the foregoing reasons it is respectfully submitted that the writ of certiorari should issue.

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